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MOTION

IN THE

Supreme Court of the United States

October Term, 1982

No. 82-346

DR. JOSEPH T. SKEHAN,

Petitioner,

vs.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, DR. ROBERT NOSSEN, DR. CHARLES CARLSON, JOHN PITTENGER, Superintendent of Education, Commonwealth of Pennsylvania, and BLOOMSBURG STATE COLLEGE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NOS. 81-1094 AND 81-1299.

MOTION TO AMEND PETITION FOR A WRIT OF CERTIORARI

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Added Questions Presented

2. Whether, where reinstatement is provided as relief for violations of the Fourteenth Amendment, a State may terminate a college professor by use of novel procedures

a. contravening successive contract procedures, rules and regulations of the college, 1970 to the present, and national academic norms accepted by the college;

b. using interested defendants' attorneys as organizers, managers and "advisors" of these irregular hearing committees.

3. Whether, where reinstatement is provided as relief for proven violations of the Fourteenth Amendment, the courts below may deny without hearing the victim's motion to enforce the order and to hold the college officials in contempt, when the court has set the hearing tentatively, when key facts were in dispute, and where in effect they dismiss the equivalent of a new action with new personal defendants under §1983.

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Respondents.

MOTION TO AMEND PETITION FOR A WRIT OF CERTIORARI

Dr. Joseph T. Skehan, petitioner, hereby moves the Court for leave to amend his petition for a writ of certiorari filed (August 23, 1982) to substitute an amendment for paragraph two, page twenty of the petition, to make an addition to its addendum, page twenty-two, and to add two questions set forth below. Petitioner asks, if this Motion is granted, the Petition be deemed amended without need to file a new version of the petition.

The amendment substituted for paragraph two, page twenty is as follows:

> The line of cases *Clark v. Barnard* (1882), *supra; Hans v. Louisiana* (1890), *supra; Missouri v. Fiske* (1933), *supra*—all suggest States are "persons" in that the immunity the State claims in each is "ratione personae", a "personal immunity", a "personal privilege".
>
> > "The immunity belonging to a state . . . is a *personal privilege* . . . its appearance in a court of the United States would be a voluntary submission to its jurisdiction, ..." This text is quoted in *Smith v. Reeves*, 178 U.S. 436; *Gunter v. Atlantic Coastline Co.*, 200 U.S. 273 and is taken from *Clark v. Barnard*, 108 U.S. 436, 447 (1882). Emphasis added.
>
> *Hans v. Louisiana*, 134 U.S. 1, reports that the State's Attorney General claimed ". . . this court is without jurisdiction *ratione personae*"; the ablative phrase, by reason of the person, refers to the State of Louisiana as a "person".
>
> In *Missouri v. Fiske*, 290 U.S. 18 at 20, Chief Justice writing for the majority opined:
>
> > ". . . whether the state has waived the immunity it now claims. Immunity from suit under the Eleventh Amendment is a *personal privilege* which may be waived. *Clark v. Barnard*, . . . (citations omitted); *Gunter v. Atlantic Coastline*, . . . (cit. omit.) . . . ." Emphasis added.
>
> Petitioner submits that this Court has held through a long line of cases over 50 years that Eleventh Amendment immunity of a State is "personal"; and that States pleading it have themselves invoked it as a bar "by reason of the person", and admitted it to be "a personal privilege" or "personal immunity" of the State, *qua* "person". Hence there

is no inconsistency between the State as a "person" exercising the limited immunity of the Eleventh Amendment, being subject to the clear language of the Fourteenth Amendment cited above, and the "person" subject to the Civil Rights Act of 1871, *i.e.* 42 USC §1983 and therefore §1988.

In the same line of cases, *Clark* (1882), *supra*, to *Missouri* (1933), *supra* this Court has regularly held that a State may waive its sovereign immunity to damages by voluntarily submitting to the jurisdiction of a Federal Court.

A Federal Court of Appeals recognized this line of cases as good law twenty years after *Missouri; Lidie v. California*, 478 F.2d 552 (9th Cir., 1973). The Court of Appeals below in this case now recognizes that this line of cases is good law (11a) but has failed to apply *Lidie, supra;* cited by *Skehan* to this case (237a-238a).

The Court of Appeals below in *Skehan* recognized that the Supreme Court in *Mayle, supra* (1978); had declared the state doctrine of sovereign immunity a judicial creation which in *Mayle* it judicially "abrogated"; and that in *Gibson*, it declared the retroactive clauses of PA Act 152 (28 September 1978) unconstitutional:

> "... Skehan's action accrued and was in existence prior to the passage of Act. No. 152 on September 28, 1978. Therefore, under the *Gibson* decision, the Act cannot be retroactively applied." (9a).

This would apply as well to the second "dismissal" the College purported to carry out 2 June 1978, the subject of the Motion to Enforce and hold the college officials in contempt.

But it did not then go on to analyze Skehan's claim that the State had waived its immunity under the *Clark* to *Missouri* chain of cases; nor his citing

of *Lidie, supra*, (9th Cir., 1973). The two circuits in like circumstances are conflicting; one is in conflict with the waiver standard of this Court.

The addition to the addendum here of the text of Article III, Section 2 of the Constitution of the United States fills a gap in the original petition.

The two additional questions presented are set forth at "i" *supra*. There follows (1) Statement of the Case, (2) Statement of the Facts and (3) Reasons for Granting the Writ for the two added questions; and thereafter an amended Conclusion.

Statement of the Case

1. Nature of the Case—Added Questions

To remedy violations of the Fourteenth Amendment in 1970, the District Court on Remand 20 July 1977 (143a-4a) ordered the College a) to reinstate Dr. Skehan; b) to provide him specific hearings "protected" by contract (169a-70a) (which the College failed to afford him in 1970 (141a)), to allow him to try to prove the non-renewal May, 1970, had violated his "academic freedom" (after the District Court (173a-189a) March, 1977, had ruled it had not violated his First Amendment rights); c) permitted the College thereafter to conduct at its option "a pre-termination" hearing "comporting with due process" (134a) (145a) to try to dismiss him for cause 8 years after the fact. (The College had both "suspended and dismissed" (49a) him in 1970 mid-contract term with no hearings whatever though his contract prescribed hearing procedures prior to either.)

In July, 1977, Dr. Skehan was reinstated; in December, 1977; he proved the non-renewal in 1970 violated his academic freedom (102a-103a); the College did not seek review of it and withdrew the non-renewal; according to the contract his contract was renewed but to date this contract violation remains "unvindicated" (25a) (236a).

The same faculty hearing committee, Committee on Professional Affairs (CPA), *sua sponte* (102a-103a), for the first time in this litigation dealt with the allegedly illegal "suspension" in 1970 (see Complaint, 1972) (49a); it recommended Dr. Skehan be restored to the classroom. To date this contract violation remains "unvindicated" by contract.

The College held a dismissal "hearing" using procedures precluded by contract, state statute and academic norms, but novelly designed by six deputy and assistant attorney generals who took over the college in-house proceedings in 1978.

Despite the many disputed issues of fact and law, the District Court denied *without hearing* Dr. Skehan's motion to enforce the order and to hold respondents in contempt (38a-41a). The Appeal Courts affirmed (14a-26a). The American Association of University Professors joined *amicus curial* Dr. Skehan's Petition for Rehearing (31a-35a) before that Court. It was denied (27a-30a).

The Courts below held, after the fact, that "minimum" due process sufficed to dismiss a college professor eight years after the same constitutional tort; that the tort feasor did not have to comply with procedures set forth in contract and statutory law either at the time of the tort or the hearing eight years later, *i.e. equal protection of the law* need not be afforded the victim of the torts;

that the added constitutional torts; that emerged from the in-house hearings upon reinstatement should remain "unvindicated"; and that no hearing need be held in district court on the victim's motion to enforce the order (24a, 38a-43a).

Whether the Defendants, including the new College President upon whom the court order fell (and a new "person" defendant by substitution), who for eight years failed to provide hearings "protected" by contract, five of those years after the adjudication of that constitutional violation (258a), could lawfully discharge Dr. Skehan again without providing him the hearing procedures "protected" by contract in 1970, or those "protected" by contract in 1977-78, upon reinstatement?

2. Statement of the Facts—Added Question

a. *Contract.* In 1973 Dr. Skehan submitted to the District Court "Academic Freedom and Tenure: Bloomsburg State College (Pennsylvania)", *55 AAUP Bulletin* 57-65, (Spring 1969), a report of its Committee A investigating the summary dismissal in 1966 of the only faculty member with a Ph.D. in the Political Science faculty during her eighth year of teaching. The report made clear that adherance to the *1940 Statement of Principles* of the American Association of University Professors (AAUP) and American Association of Colleges (AAC) necessarily implied acceptance of all Major AAUP Statements on standards, and recommended procedures, issued subsequent to the issuance of the "Principles" (See Addendum, 5A).

The District Court declined in 1973 to "take judicial notice of the censure report on Bloomsburg by the AAUP" "(Undisputed)", (129a, F.F.32 (6)); Dr. Skehan

appealed the issue to the Court of Appeals. In 1977 on renewal the District Court admitted it as P.EX 24.

Between 1967, date of AAUP entry into the academic case of D. Schockley, and 1970, onset of Skehan case, the College wrote its *1968 Statement on Continuous Employment and Academic Freedom* (hereinafter, 168 BSC St.); Article 9(a-e) complies with and incorporates verbatim much of the language of the Statements of the AAUP and AAC (outlined below) promulgated from 1940 to 1970.

In April, 1970, two events clarified the College's employment code: 1) the AAUP Convention formally added the *1970 Interpretations* to the *1940 St;* 2) the College, to avoid censure, agreed to accept the *1940 St*, by a pledge from its President, *56 AAUP Bulletin* Report of Committee A, 1969-70, 153a-163a, 161a (See DKT. _____, P. Motion for New Trial, Ex. 1(b), 7/30/77.) At Addendum, 4A).

The college confirmed its acceptance of the *1940 St* in September, 1970, by promulgating *The Faculty Handbook, 1970-71* at 12 (see *Addendum*, 2A "Dismissal", and P.EX. 68):

> "Such procedures . . . established in the *1940 Statement of Principles* . . . of the American Association of University Professors . . ."

In 1970, the College, no doubt realizing its legal vulnerability a month and half *after* the illegal summary non-renewal, suspension and dismissal purported to hold a "hearing of record" *post* termination; Dr. Skehan declined to participate (256a). In his letters about this *post* termination "hearing" the President of the College clearly confirmed the College's acceptance of the AAUP

1958 Standards and *1968 Recommended Regulations, i.e.* procedural sequence of *two faculty committees, one to investigate,* a *different one* to hold "formal" hearings:

> "in accord with the recommended AAUP procedures, I am asking *a second, elected faculty committee* to conduct a hearing of record. The statement of that committee is enclosed . . ." Letter of Defendant Nossen, P. Ex "B" attached to P. Complaint, filed 10 October, 1972.) (See Appellants Brief, 1981). (italics added)

Uncontested testimony before the District Court established in 1973 that (1) in fact, no "first" committee ever conducted a hearing or "investigated" in 1970, and (2) the appropriate "first" committee would be the *Committee on Professional Affairs (CPA),* Article 5e, Article 9a, 9b, 9b(2) of the 1968 Bloomsburg St. (N.9. 16a-17a). The AAUP 1958 and 1968 Statements require a standing elected faculty committee make a *preliminary* investigation of charges and make a recommendation to the President whether to proceed to institute formal procedures whether a non-renew (where academic freedom) is involved at the College, to suspend or to dismiss. The CPA at the College is that Committee; it could give "*preliminary* consideration" under Article 5(e), *1968 BSC St.;* and "*informally* inquire", Article 9a, *ibid.,* in dismissal; conduct a *preliminary hearing "re-suspension" (9b(2) ibid.*). Similarly, both the major AAUP Statements and 1968 BSC St. require a *second, different "ad hoc"* faculty committee of 5 members elected at that time, to conduct the *formal* hearing.

The letter 12 November 1970 from the Academic Affairs Committee, enclosed with the letter of College President 13 November 1970 (*supra*) confirmed that College

had accepted the procedures or the AAUP Statements to that date:

> "Such a hearing is in keeping with AAUP procedures, which require *preliminary investigation by one committee* (in this case the Committee on Professional Affairs, and if a next step is indicated, a hearing of record by a *second different committee.*" *(Ibid.)* (italics added).

The AAUP *1940 St.* asserted *principles* which have been interpretated by the AAUP and AAC between 1940 and April 1970 in a series of Major Statements incorporating standard of procedures, recommended procedures *et al.*

In response to *Wieman v. Updegraff, 344* US *183* (1952) and *Slochower v. Bd. Higher Education, 350* US *551* (1956) AAUP promulgated *Academic Freedom and Tenure in Quest for National Security,* "Relevant General Principles" in 1956 and held that:

"11. *Faculty Members Not on Tenure*

> . . . Dismissal or other adverse action *prior to the expiration of a term appointment* requires the same procedures as does the *dismissal* of a *faculty member with tenure;* . . . (Addendum, 8A) (italics added)

In 1958 the AAUP and AAC promulgated *Statement on Procedural Standards in Faculty Dismissal Proceedings* which set forth the procedural standard of *two successive faculty committees,* the first to "informally inquire", the second with different members to "conduct the hearing" (formal); this is incorporated in Article 9a-e of *BSC 1968 St.* (p. 6A). It was applicable to both tenured faculty and non-tenured whose tenure appointment has not expired, (*Procedural Recommendations,* at 1. p. 6A)'(7A, n.II)(Addendum, 6A-7A).

In 1977 upon reinstatement Dr. Skehan asked the College President to confer with him, with or without their respective counsels present, in order to make clear what procedures were required by contract, and to avoid any "surprise" regarding procedures. The President refused to do so; (Ex. "A" P.Mo Reconsider Stay); he asked Petitioner "to address him in writing" (*ibid.*). When Dr. Skehan did so 29 August 1977, the President referred the matter to "our legal counsel, the Department of Justice . . ." No discussion with any College official with knowledge of academia took place (*ibid.*). Thus the "in-house" hearings (234a-5a) denied Dr. Skehan in 1970, were left in hands, not of those with "the same expert knowledge of the academic environment which should enlighten the deliberations of an academic hearing agency" (235a) the Court of Appeals required in 1974.

b. *Defendants' Several Counsels Run College Hearings.* The ex-deputy attorney general who "advised" the College to deprive Dr. Skehan of this protected contractural rights to hearings before non-renewal, suspension and dismissal in 1970, William Williams, sat at the Defendants, table in District Court in 1972 and 1973. Though neither the president of the College or the faculty authorized him to do so, in 1977 he ordered "faculty" elections and managed them in October 1977. Thus the CPA was "elected"; no *ad hoc* committee was ever "elected" in 1977-78, *i.e.* the *second, different committee, alone* authorized (1970 contract) to hold "formal proceedings", BSC 1968 St., Art 5e, Art 9a-e, (n.9, 16a-17a) or to recommend dismissal.

The same ex-deputy attorney general without notice to petitioner apparently asked the Acting Attorney General to appoint five more deputy and assistant generals (Ap-

pellant Appendix, Court of Appeals (479, 478, 480) to sit as "advisors" to every faculty body, and every review body involved in the complex proceedings. No *ad hoc* committee was ever constituted. Petitioner protested to the Attorney General (478) the invasion of academia by persons holding no credentials within it and the apparent conflict of interest. In January 1978 Petitioner protested again in a letter to the President of the College (Appendix, Court of Appeals, 492, 493).

When the CPA "informally inquired" whether Petitioner's academic freedom had been violated in the nonrenewal illegally attempted (169a-170a) by the College in May 1970, said Williams and the five deputy and assistant attorney generals maintained the kind of communication to be expected between attorneys in the same law office. All were, save Levinson, full-time defense counsels for the Secretary of Education, a Defendant in this action; each had been counsel to a defendant in the related cases; all were subject to the authority of the Secretary's chief counsel, Donovan, who was one of them. Levinson was defense counsel before the Federal Courts in this action.

During these *preliminary* hearings by the CPA, Petitioner participated; meanwhile the five defendants' counsels submitted documents *ex parte* to the CPA members. (Addendum, 9A). Members of the CPA during the hearings referred repeatedly to "advice" given them *ex parte* by the several deputy and assistant attorneys general.

Said Williams, without notice to Petitioner or his counsel, manipulated the several counsels assigning them at will to committees that were never constituted or

where constituted, proceeded to "hearings" beyond their authority *e.g.* CPA, to "recommend" dismissal. The CPA's authority *re* "dismissal" (1958 AAUP St., BSC 1968 St.) is solely to *recommend whether* "formal proceedings" be instituted (16a-17a).

The same Williams, despite the absence of any proper authority from the President of the College, the party upon whom the order fell, wrote an affidavit summarized by the Court of Appeals (n.13, 20, 21a) *after the fact claiming he had been authorized* by the College President to orchestrate the elections, the deputy and assistant attorney general, the faculty committees, *et al.* No such letter authorizing the meeting of the CPA to conduct "formal proceedings" (violation of Article 9 c&d, BSC St. 1968, and AAUP 1958 St.) was received at any time by Petitioner or his Counsel in 1977-78 during the College proceedings. (See the undisputed Affidavit submitted to the District Court with Plaintiff's Motion to Stay, DKT. 225, "October 1977, Motion to Reconsider and Motions to Stay parts of the Order pending determination of all motions and appeals challenging it." in Court of Appeals, DKT.S 230 and 238; also at 104a-106a, 97a-101a).

3. Plaintiff-Petitioner presented the District Court in 1973 during a two day hearing, the *1968 BSC St.*, on its face a contract authorized by 1929 PA Administrative Code, P.L. 177, amended 1963, Section 131 (a) through (d) (and so confirmed 145a-172a), four years later. The complaint alleged three separate violations of the Fourteenth Amendment; non-renewal without hearings required by "protected" contract procedures, May 1970; summary suspension (October 1977) and summary dismissal in the middle of a contract term.

The District Court made no findings about the "protected" contract violations, but found a violation of the Fourteenth Amendment because of the summary dismissal October 1970 (251a-267a). The Court of Appeals remanded for finding of fact regarding Article 5(e) and 9. The District Court claimed that the illegality of the suspension had never been presented to that court, nor the illegality of the non-renewal.

In 1973 the District refused to take judicial notice of the investigation of the College in 1967-1970 by the American Association of University Professors (AAUP)(F.F.#32, (6), 129a); Plaintiff appealed.

In 1977 the District Court repeated its view that the allegations regarding the illegal non-renewal (Article 5e) and suspension (Art. 9b(2)) were not raised in 1973. Undisputed testimony by Plaintiff in 1973 (TR, JAN 11, 12, 1973) and Dean of Arts and Sciences verified that none of the hearings required to non-renew or to suspend were held in 1970 by the College. In 1978 the Court of Appeals affirmed that the complaint did allege the three violations (49a). That Court took no action on the suspension allegation; to date it *remains unvindicated* (25a) after being proven before the CPA (college committee for preliminary investigation) and left unreviewed by the College (which could have invoked the *ad hoc* committee to try to overturn the CPA).

Meanwhile, because of the numerous improprieties of the College and the six deputy and assistant attorneys general, Petitioner asked the Court of Appeals to stay the College proceedings. The motions were denied by J. Rosenn (97a-101a) (See Addendum) who later served on the panel of the Court of Appeals in 1982 (1a). The Court

of Appeals asked Petitioner first to raise any issue about the College hearings in the District Court (90a).

Petitioner did so August 1, 1980, filing a Motion to Enforce the Order of 20 July 1977 and seeking Contempt against the Defendants. Since a separate issue, alleged failure of the Defendants to act in accord with the Administrative Agency Law of Pennsylvania, or 1 PA Code 35, *et seq.* on hearings or the Sunshine Law or the *Formal opinion* of the Attorney General #46 of 1974, was currently before the state courts, and might dispositive of the issues in whole or in part, and in order to reduce the burden on both courts, and upon the parties; and *since* the union, signatory to the successive contract *1971-present* had undertaken to grieve 1978 "dismissal" of its member, Skehan, both parties stipulated (Addendum, 10A-11A) that all issues save Attorney's Fee be continued pending the results of those actions. The District Court refused to consider the issues of state law (42a) and denied the stipulated continuance (Addendum, 12A).

The District Court denied the Motion to Enforce without hearing after having said it would place it on the January 1981 trial list because affidavits could not be cross-examined; it agreed that its lengthy trial rules did not preclude a hearing. The Defendants' counsel agreed that only a hearing would permit cross-examination of those who filed affidavits. In his reply brief Petitioner's Counsel asked for a hearing (Addendum, 10A).

> "It is apparent from the parties pleadings and briefs there are factual differences ... an affidavit of someone other than the president ... classified as hearsay even more remote. It is therefore suggested that a hearing be conducted ... for determining both factual and legal issues."

He noted the confusion engendered by the defendants which led their counsel before the District Court to misstate, concerning what faculty committee purported to conduct "formal proceedings":

> "Defendants current counsel was confused as to what took place . . .";

And in the Motion to Alter and Amend noted that the District Court remained confused in November 1980 (40a) in its opinion:

> "There is also no dispute that the Defendants provided Plaintiff with a hearing *before four faculty members* . . ." (Italics added)

when in fact another novel committee was substituted without notice to the Plaintiff (21a) composed of nine faculty members (not the elected *ad hoc* committee).

The District Court opined and it is undisputed that

> ". . . the administration of the College takes no position on the truth or falsity of the charges . . ." (40a)

whereas the dismissal procedures of the College require that the *President* of the College a) discuss the matter with the faculty member, b) refer the matter to the CPA for "informal inquiry". Should the CPA recommend against dismissal the President may still dismiss, but the faculty member can ask for *formal hearings*. He did. None were held. No *ad hoc* committee was ever elected. It is that body which makes the determination.

The President had to be and in 1978 was the prosecutor; after the CPA "informal inquiry" and recommendation to proceed or not to proceed to prosecution of a dismissal, the *President charges* the faculty member. Only the *ad hoc* faculty committee can make a *recommendation to dismiss mid-contract.* (n 9. 16a-17a).

No affidavit from the President was presented to the District Court. No letter from the President upon whom the Order was served, authorized the Attorney General or his six deputy and assistant attorney general to invoke academic hearing committees or to usurp academic procedures.

The Appeals Court affirmed the denial of Petitioner's Motion to Enforce (without hearing (14a-26a)).

AAUP entered *Amicus curia* to support Petitioner's Sur Petition (31a-36a), noting the many circuits had held that AAUP statements are to be used in interpreting College contracts, especially where the College accepted to proceed according to these industry wide agreements; the *1940 Statement of Principles and Interpretive Comments*, as in the instant case; or where there is "acknowledged illogic" in a college's regulations.

The Appeals Court denied the Petition to rehear. However, one panel member pronounced a contradiction. He opined: the order "merely required . . . a hearing complying with due process" not one complying with the college's acceptance AAUP standards in 1970 (28a). The same member of the panel averred: "I agree, however, with the American Association of University Professors (AAUP)"; it urged a rehearing (36a) which the Judge denied; (29a-30a); moreover where the AAUP (131a-36a) urged the Court of Appeals to reconsider and apply the Statements of the AAUP (31a-36a), the same panel member said:

> "I agree . . . with . . . (AAUP) . . . it is unnecessary for this Court to reach the question whether certain AAUP policy statements should be read into Bloomsburg's written policy regarding dismissal of non-tenured faculty members." (30a-31a)

Clearly this misreading by one panel member summarized the issue.

Reasons for Granting the Writ

2a.

In 1972 this Court ruled that "comporting with due process" before terminating contract interests of a college professor, *Board of Regents v. Roth*, 408 U.S. 564, required that *procedures in the contract for its termination* must be afforded the professor *prior* to termination. Thus this Court explored state law, understandings, college regulations, *Roth ibid.*, N.1, N.2, N.3 and N.4 to ascertain what procedures, if any, were in the contract.

In *Skehan*, the District Court found that the College dismissed Skehan (terminated his contract mid-term) without any *prior* hearing whatever (258a), and failed to afford him the procedures of Article 5c, *BSC 1968 St.* before non-renewing him (another form of termination), and thereby, in each instance, violated his procedural due process rights. *Skehan v. Board of Trustees, Bloomsburg, State College et al.*, 431 F. Supp. 1379, 1391 (169a-171a); affirmed 590 F.2d 470 (67a-71a), Cert. denied, 444 U.S. 632 (1979) (44a).

The law in *Skehan, supra*, accord *Roth, supra*, required the "pre-termination ... at the option of the (College) president" (145a), "comporting with due process" (134a)—part of the remedy—comply with the procedures set forth in the contract, either the contract on reinstatement (1978), or the original contract in effect at the time of the constitutional tort, 1970.

Since the successive contracts, 1968 to 1978, during the entire period from the tortious deprivation, 1970, to the hearing permitted the College in 1978, all contained procedural safeguards before termination, for the courts

below to suggest after the fact that "due process" was "protean", or only "minimum due process" was required, contradicts this Court's holding in *Roth, supra*, and the law of the case in *Skehan, supra*.

Any other interpretation would enable tort leasors to gain by such torts. If they can drag out litigation, and the remedy should give the tort leasor a chance to hold a hearing eight years after the tort, he could provide any sort of hearing, he pleased—though it breech property rights again,—and claim it complied with "minimum due process" (after the fact). But this Court teaches:

> "the ancient institution . . . to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily dismissed" (*Roth, supra* at 561)

is *property*.

As the facts *supra* make clear, in 1970, the College had promulgated the *1968 BSC St.* under a state statute; *dismissal* required the *two-tier* system: one committee to "informally inquire"; a *second, different, committee* elected *ad hoc* by the faculty, to conduct the formal hearings. The College was threatened with censure 1967-1969 because of the case of Dr. Shockley; the AAUP told the College that to avoid censure it must accept the *AAUP 1940 St;* that by accepting it, it thereby accepted all major intervening AAUP and/or AAC Statements. One of them directly required faculty on tenure, or in the middle of a contract, must have the *same* procedural safeguards; another granted an "entitlement" to the *1958 AAUP St.* procedures, *i.e.* the same "dismissal" procedures for both tenured and non-tenured to be "dismissed" mid-contract. The College accepted the *1940 St.* in September, 1970, by promulgating it in the *BSC Faculty Handbook 1970-71.*

The president of the College admitted the two-tier system of faculty committees applied to Skehan in his correspondence after the October, 1970 tortious dismissal of Skehan.

Petitioner submitted the aforesaid, AAUP report *(AAUP Bulletin,* Vol. 55, No. 1, 1969, Addendum, 3A) together with the admissions made by the College president in his aforesaid correspondence, to the District Court in 1973, on remand in 1977, and again on remand in 1980.

In 1973, 1977 and 1980, the District Court repeatedly claimed that the non-renewal and suspension issues were not raised in the complaint or at the 1973 hearing (148a, 134a), and refused to review judicially the *AAUP Bulletin, (supra)* investigation report on the College (1969). The Appeals Court has had to correct these oversights repeatedly (244a, 49a, 65a, 67a).

The sheer complexity of the several torts committed by the Respondents against the Petitioner: illicit non-renewal, May, 1970; threatened summary dismissal and its withdrawn by the Trustees, June 1970; illicit suspension, October 1970; illicit dismissal, October 1970, and the violation of his academic freedom (102a, 103a), should not discourage the courts below or keep them from persisting in ascertaining the truth, and enforcing the remedy. For the burden of constitutional torts must fall upon the tort feasor and not upon his victim.

The *amicus* brief of the *American Association of Chemistry Professors,* (31a-36a), avers that the Court of Appeals interpretation of the *AAUP 1940 Statement:*

> "contradicts a growing body of precedents from federal and state courts"

Accord this Court, *Perry v. Sinderman*, 408 U.S. 593, 602 (1972), *Board of Regents v. Roth, supra*, (1972), *Steelworkers v. Warrior and Gulf Co.*, 363 U.S. 574, 579; accord four circuits: *Browzin v. Catholic University of America*, 527 F.2d 843 (D.C. Cir. 1975); *Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir., 1978); *Mabey v. Reagan*, 537 F.2d 1036, 1043 (9th Cir. 1976); *Cusumano v. Ratchford*, 507 F.2d 980, 986 n.14 (8th Cir., 1974); accord State Supreme Courts; *Drans v. Providence College*, 383 A.2d 1033, 1038 (1977); *Lehman v. Board of Trustees of Whitman College*, 89 Wash. 2d 824, 576 P.2d 397 (1978); accord numerous district courts (32a-35a). The passage on page 18 of the Court of Appeals opinion (18a):

> "misconstrues the express meaning of the 1940 statement which requires as a fundamental principle that a non-tenured faculty member dismissed for cause during the term of a contract receive the same procedural protection as a tenured faculty member. . . ." (32a)

The AAUP added:

> "disregarding the requirements of the AAUP documents 'would render tenure meaningless by allowing the College to serve as the sole judge of its behavior' " 322 A.2d at 855 (33a, 34a) *(AAUP (Bloomfield College Chapter) v. Bloomfield College*, 322 A.2d 846, N.J. Super. 1974, aff'd 346 A.2d 615 (App. Div. 1975))

and

> ". . . page 18 of this Court's (Appeals) opinion, unfortunately and unnecessarily precludes the judiciary from considering the reasoned development of *policy within the academic community* and *encourages* the very resort to *litigation* that this Court, in the instant case and elsewhere, has eloquently decreed." (36a) (italics added)

For the Appeals Court to cite *Chung v. Park*, 514 F.2d 382 (3rd Cir.) (23a), was singularly inappropriate. In *Chung* no constitutional tort was ever found; in *Skehan*, two were adjudicated and two more emerged during the college hearing *intra vires* (1977) (102a-103a). The gravamen of *Chung, supra* was whether a college professor *waived* his contractual, "protected", procedural rights by agreeing to and participating in other procedures; in *Skehan*, the professor reasserted emphatically to the college president the precise source of the procedural rights the president was trying to strip him of, and refused to participate.

In *Chung*, a full stenographic record of all proceedings was made by a qualified stenographer; in *Skehan*, no stenographic record was made of any proceeding; only a careless and unprofessional tape recording on an old college machine was made of some sessions; no one person was assigned the duty of running it to record nine committee members, 3 attorneys and the witness speaking at once; and none of the numerous *ex parte* sessions of the committee with the college's officials or attorneys.

By *Skehan*, (1978), the courts below over-ruled *Chung, supra*, (1975), in as much as it claimed that mere "protean", "minimum due process" could satisfy "protected" contract procedures (169a, 135a, 64a, 65a-71a).

In part, *Chung, supra*, supports *Skehan*. If *Chung* waived his "protected", contractual rights *because he did "participate fully"* in procedures vastly different from those his contract required, then *Skehan* ran the same risk if he participated. For Skehan to have participated in a hearing by a committee acting *ultra vires* would allow the tort lessors to make a like waiver claim; and in light of their failure to produce any stenographic

record, the tort lessors could claim Skehan was both "agreeing" and "participating"—without contradiction from a non-existent record. The Court of Appeals makes the only remedy for all these constitutional torts a *recordless hearing:*

> "That witnesses were not placed under oath and that no stenographic record was kept of the proceedings do not amount to a denial of due process." *Skehan, supra,* at 41a.

The Court of Appeals would render the remedies meaningless together with the teaching of *Roth, supra* (see all citations cited). In the face of clear contractual, *i.e.,* "protected" procedural rights to a stenographic record (n.11, 18a), the opinion of the Court of Appeals clearly contradicts this Court's view in *Roth, supra, et al.*

2b.

This District Court found in 1973 (260a), that

> "... had the plaintiff been afforded a hearing prior to his discharge, in all probability the outcome would have been the same. *358 F. Supp.* at 436. (229a)

The Appeals Court specifically reversed it in 1974:

> "... it was *not proper* for *the court* to *substitute the findings it made* for the in-house hearing the institution should have afforded prior to termination of the 1970-71 contract.... (229a)
>
> "The District Court cannot exercise the *discretion* which is *vested* in an *administrative hearing board; nor* can it bring to the dispute the *same expert knowledge of* the *academic environment* which should enlighten the deliberations of an *academic hearing agency.*" (234a-235a) (italics added)

> "Furthermore, if we countenance the *practice of making findings* which the *institution should have made*, a substantial *incentive* toward affording procedural *due process* prior to contract termination will be *removed*. The result will be to place *considerable unreviewable discretion* in the hands of the *administrators by permitting discriminatory application of the availability of pretermination hearings.* (235a) cert. granted (220a)

The substitution of six deputy and assistant attorneys general for those with "expert knowledge of the academic environment" is no more proper than "for the (District) Court" to substitute findings it made for the in-house hearing...." 501 F.2d 31 (1974) (234a-235a). See this Court's opinion inappositely cited by the Court of Appeals: *Withrow v. Larkin*, 421 U.S. 35 (1975) and *Hoke v. Board of Medical Examiners*, (three judge court), 295 F. Supp. 357 (W.D. N.C. 1975) (22a-23a). Respectively, in Wisconsin and North Carolina statutes required that *medical examiners*, clearly *doctors*, both investigate and adjudicate charges involving *doctors*. In *Skehan*, college regulations and contracts under state statutes require faculty committees of professors both to investigate (*one committee*), to help the president draw up charges (not for a deputy attorney general to do so), and adjudicate (*a second different committee of the faculty*) professional charges against a professor (accord the rules of the professional society.)

None of the six attorneys general was ever accredited as an academician. Richardon, Frank, Solomon and Williams were employed full-time by the Department of Education as defense counsels for the Secretary and college presidents under the supervision of the fifth, Donovan, the Secretary's chief counsel in 1977-78. Levinson represented the defendants in federal court.

Williams, an ex-attorney general in 1977-78, had advised the Secretary and college president to commit the several Constitutional torts against Skehan in 1970 (151a, 156a at 38 and 41, 148a, 159a, 169a); he was, we must assume, interested in reducing the embarrassment he had caused the Department in 1970—all of which led to his removal as chief counsel to the secretary and his appointment "Special Advisor" to the college president.*

The interest of the secretary's other five counsels was exposed by the Court of Appeals. Skehan, already entitled to extensive damages (235a-236a), saw them increased during the college hearings *intra vires*. The CPA found: (1) his academic freedom was violated (not appealed by College president to *ad hoc—second different committee*) (the President withdrew the 1970 non-renewal and thereby extended Skehan's contract through June, 1972, and into tenure, 236a); (2) overturned the suspension, the very grounds for the dismissal in 1970 (226) (the President ignored this CPA recommendation, contrary to contract and professional norms; he could appeal to the *ad hoc* committee but did not). These counsels interpret *Carey v. Piphus*, 435 U.S. 247 (1978) to mean any sort of finding adverse to the plaintiff, even one from a body active *ultra vires*, could justify denying these ever growing damages before federal or state courts. As full-time career counsels to the secretary, their career prospects

* The PA Attorney General named Richardson as counsel of the Committee on Professional Affairs (CPA)—NOT Jack Solomon. Williams, with no warrant from anyone, wrote the affidavit quoted at n.13 (20a, 21a, unattributed). Frank claimed to represent the college president before the fact; Williams wrote said affidavit, after the fact. Levinson claimed to represent the "administration", including the president. Who in fact did represent the college president? Levinson, Frank or Williams (openly or covertly)? Such confusion precludes "fair hearing" at any rate.

would be greatly enhanced should they succeed in getting such a finding by any measure.

Plaintiff's several lenghty uncontested affidavits describing the *ex parte* acts of the six attorneys general supported four motions to stay parts of the order of 20, July, 1977, "pending final determination of all motions and appeals challenging it," or to seek reconsideration of those motions. In each case J. Muir denied both for the district court (404a-106a) and J. Rosenn for the Appeals Court (48a-101a). J. Rosenn served on the panel in 1982 (1a). All affidavits were re-introduced to the district court in 1980.

The six counsels of the Secretary conducted repeated *ex parte* meeting with the faculty committee (CPA); they were both unannounced and unrecorded. They submitted documents *sub rosa* to the CPA without notice to the plaintiff or his counsel, planned and coordinated their strategy to obtain the results sought by their common principal, the defendant Secretary of Education. (Addendum, 9A). One conducted "faculty election", usurping the role of the faculty committee for that purpose. Indeed, the CPA, knew it could not consider a recommendation to dismiss (as, *ultra vires*), yet it met without any warrant or charges certified by the president, as college rules required; apparently the secretary's six counsels ordered them to meet *ultra vires*. One of them drafted the charges the president refused to support, before the fact, as required by contract. The "confusion" the Court of Appeals noted (20a), was antithetic to a "fair hearing" before a "fair tribunal."

The six counsel-"advisors" wrote that procedures of PA Sunshine Law, Administrative Agency Law, and the

Attorney General Formal Ruling #46 of 1974 would be complied with; none were. Plaintiff's counsel noted the conflict:

> "Fundamental fairness should require that a body provide those procedures which they have stated they would provide. Therefore, the question before this court is not whether or not the Sunshine Law and Administrative Agency* Law are required under state law but whether or not they are *required by due process once the defendants have stated they would be complied with.* If the integrity of the government is to be maintained, its officials should not be permitted to say one thing and do another" (Addendum, 9A). (Italics added)

The use of house attorneys to manage faculty bodies and their hearings has been condemned by the professional society as a "conflict of interest." Committee A of the AAUP, chaired by Clark Byse, Harvard Law School, just a year before (1976), affirmed:

> "... the use of house counsel by a faculty body, when counsel is representing the administration in the same case, should be discouraged as a conflict of interest." *AAUP Bulletin*, No. 1.62 No. 2 at 182, Summer, 1976 (Addendum, 5A).

In arbitrations conducted under the then current contract (1977-78), the Attorney General would have no member of his staff represent the Commonwealth for fear of conflict of interest *Dr. Mac Murray v. Bloomsburg State College, et al.*, 426 F. Supp. 1171 (1977) (M.D. Pa.). In *Skehan*, the arbitrator promptly removed himself when the attorney representing the union and Skehan

* These laws require notice of meetings, sworn testimony, preparation of a stenographic record *before* post hearing briefs or review by other bodies. None were complied with by Respondents.

noted that he was the son of the "counsel general" of PA, an intimate of said Williams, Esquire (one of the six counsels managing the college hearings), because of conflict of interest.

By contrast, the district court in *Chung, supra*, noted with favor that the hearing committee:

> "contained three unbiased persons including an attorney and two professors who taught at colleges other than Mansfield State College" 377 F. Supp. 524, 530

The attorney had no connection with the Attorney General, the college president or the Secretary of Education.

DR 5-105 prohibits lawyers from representing clients with conflicting interests; it requires them specifically to decline employment where "no partner or associate of his firm may accept or continue such employment".

The Second Circuit Court of Appeals has held:

> "Morgan Lewis argued below that it built a Chinese Wall within the form and that no information passed between the two groups of attorneys.... The Court below found that no such 'Chinese Wall' could be created in a single firm. We incline to agree" *Fund of Funds Ltd., Inc. v. Arthur Anderson Co.*, 567 F.2d 225, 229 n.10 (1977)

The extraordinary, uncritical restatement by the Court of Appeals of the language of the several counsels to the secretary:

> "The administration takes no position on the truth or falsity of these charges.... As counsel to the president, I knew his position as one of the decision maker, not a prosecutor in this instance" (14a)

portrays a lack of knowledge of college rules and academic norms for such a serious matter as a dismissal hearing. The *BSC 1968 St.* requires the President state *his* "conviction" that the charges are true. The scandal created by a college president, chief administrator of a group of scholars, making charges he has no idea are true or false, strikes at the very core of scholarship itself. As chief administrator, he has to bear the responsibility; but as a leader of scholars, he is supposed to know what he is talking about!

The two-tier system (*one committee to investigate, a second, different, committee to adjudicate*) has been designed by the profession with the help of eminent jurists since 1915 statement of AAUP (31a), to make sure college presidents are sure of what they say before they say it, because their actions reflect upon the whole institution and profession. The brash juggling of terms "administration", and "president", "prosecutor" and "decision maker" by one of the secretary's counsels, and quoted by another, demonstrates a capacity for abusing language but a grave misunderstanding of the role of the president of a college and his awesome responsibility as a scholar, let alone, of the college rules and academic norms designed to keep him from serious error. Here we see clearly the inherent conflict between the self-serving interests of the secretary and his agents, and the interests of the college, its faculty and the academic profession.

The president, defying academic safeguards, which college rules afforded him, had already announced himself to be a prosecutorial decision maker. Defying the findings of the CPA acting *intra vires* (101a, 25a, 102a): (1) academic freedom violation; (2) illicit suspension, the

very ground of the 1970 tortious dismissal (226a), the president opted to hold a dismissal (145a). He had already made himself an extraordinary president—prosecutor—decision maker!

This Court has already applied *Wood v. Strickland*, 420 U.S. 308 (1975), to this case (220a, 210a-217a)—*Re* the obligation of college presidents to know the constitutional rights of the persons subject to their authority. Petitioner submits that this Court should enforce its earlier grant of *certiorari* upon this tergiversatious college president who seeks to exercise the authority of his office without any responsibility; who defies college rules, academic norms and tries to dodge behind a self-serving counsel who clearly is innocent of minimum knowledge to act in acadamia.

The "uneasiness" of the Court of Appeals (25a) is well grounded. The appearance of justice is required by due process:

> "A fair trial in a fair tribunal is a basic requirement of due process . . . our system of justice has always endeavored to prevent even the probability of unfairness. . . . *Circumstances and relationships must be considered*. . . justice must satisfy the appearance of justice." *In Re Morchison*, 349 U.S. 133, 136 (1955) Emphasis added.

When a faculty body meets *ultra vires* to dismiss a professor where no one has given it a warrant to do so (P. Br., No. Alter and Amend, Addendum), to hear professional charges drawn by a Deputy Attorney General—charges which the president of an American college refuses to honor or accept, what must any student, faculty member or observant citizen think of the grave "unfairness" condoned by the uncritical opinion of the Third Circuit Court of Appeals.

3a.

The District Court was obliged to grant a hearing to consider Petitioner's Motion to Enforce its Order. It could have accepted the mutual stipulation of the parties to continue that issue until after adjudication by the state courts and the arbitration by the union, and thus reduce the burden to itself (Addendum, 10A-11A). It chose to deny the parties' stipulation.

On 10, September, 1980, the district judge affirmed such a hearing would take place on the January, 1981, trial list (TR. at 14, 10, Sept. 1980, Appendix below at 773)

> "The Court: . . . What is your view Miss Forney (D. Counsel)
>
> Miss Forney: . . . whether we will be able to put the case at issue through affidavits. I have some doubts.
>
> The Court: I am reluctant to decide anything on affidavits. . . . we are going to have to have a hearing on it.
>
> Mr. Glassberg: We have no objection to that . . . . (P's Counsel)
>
> The Court: . . . I think we will probably have to put it on the January trial list.

The Court, without warning, issued an opinion December 5, 1980, which substantially added to the confusion (38a-42a). It held:

> "There is also no dispute that the Defendants provided Plaintiff with a hearing *before four faculty members*, all of whom served on the Committee or Professional Affairs. . . ."

No one had ever suggested any *committee of four faculty members* was involved at any time. The six counsels for the Defendant Secretary of Education, had confused Miss Forney, Defendants' counsel before the district court in 1980 (almost 2 years after the events in January, 1978). Her brief had claimed a *five man faculty committee had met;* she sent a correction to the district court (Addendum, 11A). A five member committee had been proposed by the six defendants' counsel; notice was sent Petitioner. In fact, this committee never was constituted and never met. No notice was sent about the nine member committee until two weeks after it met *ex parte* with the defendants "advisor" attorneys.

The district court had written:

> "Establishing special hearing boards as suggested by the defendants could result in Skehan not being afforded protection equivalent to that provided by 5e." (155a).

The Defendants proposed and withdrew all sorts of such novel procedures. Not only was the Defendants' counsel before the district court twenty-one to twenty-three months after the fact, Petitioner and his counsel were confused by the incoherent activity of the six non-academicians in academia during the college hearings.

> ". . . the defendants derived their own procedure, which they kept changing and the final four was never made known to the plaintiff. Defendants current counsel was confused as to what took place, and so, how could a layman who had great interests at stake be expected to assert to proceedings the nature and ramifications of which were not set forth. It is significant to remember in light of *Chung v. Park*, 514 F.2d 382 (1975), that plaintiff could have waived his rights. . . . by attending and par-

> ticipating in the hearing; and while rights may be waived, the law certainly does not require that they be waived. . . . the plaintiff refused to walk down the blind alley which the defendants contend was due process. Due process is not to be renewed from hindsight, but what the individual was facing at the relevant time in question" (P. Reply Br, Mo. Enforce, Addendum, 10A).

The district court had set the law in the case: failure to afford plaintiff the procedures required by the contract violated the due process clause of the Fourteenth Amendment (169a, 170a). The college "hearing", 1978 did not. Skehan wrote demanding that the college president, McCormick, follow them. The district court could not, after the fact, invoke "protean" due process, overturning his own law in the case, refuse a hearing promised by him, a promise relied upon by Skehan. Not only were many facts and legal issues disputed (Addendum, 12A), but clearly the total confusion generated by the six counsels in January, 1980, engulfed the district court. In the absence of a stenographic record, the court remained ever more confused than defendants' counsel, plaintiff's counsel and plaintiff. Discovery and a hearing would make possible a sound basis to resolve "undisputed facts", save the court time and give it facts upon which to rely to make a sound judgment. Its own law of the case precluded retreat to protean due process to try to evade investigating the complex tergiversations of defendants through a "hearing".

The new torts exposed by the college hearings required the district court's adjudication. To date, the Appeals Court noted, they remain "unvindicated".

Taken together with the defendants avoidance of the law in the case, the new torts gave rise to what amounted to a new action involving new personal defendants. The district court's refusal to hear Petitioner's motion amounted to dismissal of a new complaint. Quite properly the new case on the remedy should relate to the continuing action for a number of reasons: liability, immunity et al. Such a dismissal is not permissible under the teaching of this court in *Schever v. Rhodes*, 412 U.S. 232 (1974), cited repeatedly in *Skehan* (212a).

That the district court permitted the abuses cited in Petitioner's Motion to Enforce and left "unvindicated" (25a) the new torts that emerged from the college hearings *intra vires*, flies in the face of this court's teaching concerning remedies to be afforded the victims of state tortfeasors:

> "The central aim of the Civil Rights Act was to provide protection to those wronged by '(m)isuse of power possessed by virtue of state law and made possible only because the wrong-doer is clothed with the authority of the state law.' *Monroe v. Pape*, 365 U.S. 187 . . . . (1961) (quoting *United States v. Classic*, 313 U.S. 299, 326 . . ." *Owen v. City of Independence, Missouri et al.*, _____ U.S. _____, 63 L. Ed. 2d 673, 100 S. Ct. _____ (1980) at 693

and,

> "Moreover, §1983 was intended . . . to *serve as a deterrent against future constitutional deprivations*" (*ibid.* at 694)

not an invitation for the invasion of academia by six defendants counsels unqualified in academic laws and procedures to seek their principal's interest. The dismissal in effect of an action complaining of further

such abuses during the remedy for multiple constitutional torts already proven, undermines this court's aim.

> "Furthermore, the threat that damages might be levied . . . encourage those in policy-making positions to institute internal rules and programs designed to minimize the likelihood of institutional infringements of constitutional rights (*ibid.*)

Conclusion

For the reasons given above, Petitioner submits that certiorari should be granted and the case remanded for further consideration in light of the line of cases from *Clark v. Barnard*, 108 U.S. 18 (1883) through *Lidie v. State of California*, 478 F.2d 552 (9th Cir. 1973), and *Chung v. Park*, 377 F. Supp. 524, 429 (1974) on waiver of sovereign immunity "by a general appearance and litigation in federal court" (*ibid.*); in light of the opinions of this Court in *Roth*, *supra*, *Sinderman*, *supra*, and *Steelworkers*, *supra*, and the opinions of the District, 4th, 8th and 9th Circuits (cases cited *supra*) upon the role of industry-wide statements in construing legal contracts between professors and universities; and to reconsider denial of a court hearing on a motion to enforce the hearing remedy, in face of newly emerging violations proven during the remedy and as yet "unvindicated".

Respectfully submitted

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ADDENDUM

Constitution of the United States

Article III, Section 2.

Article III, Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, ...

Constitution of Pennsylvania

Article I, Section 11.

Section 11. All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Addendum—Bloomsburg State College Faculty Handbook, 1970-71.

Excerpts:

Cover -

BLOOMSBURG STATE COLLEGE FACULTY HANDBOOK, 1970-71

. . . .

Page 1. I. Foreword

The Faculty Handbook is designed as an authoritative manual of the duties, responsibilities, rights and privileges of the Faculty of Bloomsburg State College.

. . . .

Page 12. Employment and Dismissal Policies

Since faculty status and related matters in such areas as appointments, reappointments, decisions not to reappoint, and granting of continuous employment are primarily a faculty responsibility, the President of the College and the Board of Trustees will act in such matters with the advice of and in consultation with the Committee on Professional Affairs. Such procedures are established in the *1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors.*

Although the President of the College and the Board of Trustees are by law charged with this responsibility, they should concur with the faculty judgment on questions of faculty status except in rare instances and for compelling reasons which should be stated in detail.

. . . .

Page 90. . . . .

Cover - (Seal) Bloomsburg State College,
Bloomsburg, Pennsylvania

Addendum—AAUP Bulletin: Reports of Committee "A".

AAUP Bulletin: REPORTS OF THE ACADEMIC FREEDOM COMMITTEE, "COMMITTEE A", AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (AAUP)

Vol. 55, No. 1 SPRING ISSUE 1969, pp. 57-65

Academic Freedom and Tenure: Bloomsburg State College (Pennsylvania)

P.57. I. Introduction

. . . .

P. 58. II. The Case of Dr. Barbara Shockley

. . . .

In early March (1967) Professor Shockley wrote to the Association's Washington Office for advice and assistance . . . the General Secretary wrote to President Andress . . . Shockley tendered notice of termination of services without being given stated cause or provided with an opportunity for an appropriate hearing . . . The President answered College did not subscribe to the principles of the 1940 Statement; in reply he was told that the promulgators and endorsers of the Statement considered it applicable to higher education as a whole, quite apart from specific adoptions.

. . . .

President Andruss was willing to agree to a faculty hearing in the spirit of the 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings,* but he specifically rejected any implication that Dr. Shockley had attained tenure . . . . . a two-day hearing was finally held on June 27 - 28, 1967 . . .

A stenographic transcript was made.

. . . .

. . ., *ad hoc* committee to investigate the case. The undersigned committee spent March 21 and 22, 1968 at Bloomsburg State College . . .

. . . .

Addendum—AAUP Bulletin: Reports of Committee "A".

P.65. IV. Conclusions

. . . .

2. Notice of only three months to Dr. Shockley . . . was in violation of the provision of the 1940 *Statement of Principles on Academic Freedom and Tenure* calling for at least a year's notice . . .

3. The regulations on academic freedom and tenure currently in effect at B.S.C. represent an improvement *but fall* distinctly short of accepted standards in regard to notice, due process and general applicability.

. . . .

James O. Freedman (LAW), University of Pennsylvania

. . . .

Investigating Committee

Committee A on Academic Freedom and Tenure has by vote authorized the publication of this report in the **AAUP Bulletin**

Sanford H. Kadish (LAW) University of California, Chairman Members: . . . Clark Byse (LAW), Harvard University . . ., C. Dallas Sands (LAW), University of Alabama;

. . . .

Vol. 56, No. 2 Summer Issue 1970, pp. 153-163 at 161, 163

. . . .

P.161 V. Review of Noncensured Administrations Previously Reported

. . . .

Bloomsburg State College (Pennsylvania).

. . . .

The new president has stated that he "will operate (his) office in accord with the 1940 Statement."

. . . .

Committee A will review these matters again at its October 1970 meeting.

. . . .

Addendum—AAUP Redbook: Policy Documents and Reports, 1977-Excerpts.

P.163. (Note: The Fifty-sixth Annual Meeting voted endorsement of the Interpretive Comments.)
Sanford H. Kadish (LAW)
University of California, Chairman
Vol. 62, No. 2 Summer Issue, August 1976, pp. 169-183 at 182 and 183

P.182. D. Use of Legal Counsel by Academic Departments
. . . inquiries concerning retention of counsel by faculty hearing bodies . . . when the administration and the individual are both represented by attorneys.
. . . use of house counsel by a faculty body, representing the administration in the same case, should be discouraged as a conflict of interest . . .

. . . .

P.183. Clark Byse (LAW)
Harvard University, Chairman

Excerpts:
AAUP POLICY DOCUMENTS AND REPORTS
1977 Edition (The "Red Book")*

P.1. ACADEMIC FREEDOM AND TENURE
1940 Statement of Principles and Interpretive Comments
In 1940, following a series of joint conferences begun in 1934, representatives of the American Association of University Professors and of the Association of American Colleges agreed upon a restatement of principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure. This restatement is known to the profession as the 1940 Statement of Principles on Academic Freedom and Tenure. The 1940 Statement is printed below, followed by Interpretive Comments as developed by representatives of the American Association of University Professors and the Association of American Colleges during 1969.

. . . .

Addendum—AAUP Redbook: Policy Documents and Reports, 1977-Excerpts.

P.2. The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to assure them in colleges and universities.

. . . .

Academic Freedom

. . . .

n. 3 Bold face numbers in brackets refer to Interpretive Comments which follow.

*The Amicus in the Circuit Court filed three copies of the "Red Book" with the Clerk there; the full text is therefore available in the record of this case.

(4) Termination of cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment.

(Note: text printed in part in Appendix, page 18, n. 11) at the institution*

1940 Interpretations

. . . .

1970 Interpretive Comments

. . . .

9. A further specification of the academic due process to which a teacher is entitled under this paragraph is contained in the *Statement on Procedural Standards in Faculty Dismissal Procedings.*

. . . .

P.5. STATEMENT ON PROCEDURAL STANDARDS IN FACULTY DISMISSAL PROCEEDINGS (1958)

. . . .

Introductory Comments

. . . .

P.6. Procedural Recommendations

1. Preliminary Proceedings Concerning the Fitness of a Faculty Member

When the *fitness* of faculty member who has tenure or whose term appointment has not expired, the administrative officers

discuss the matter with him in . . . . . .if an adjustment does not result, a standing or ad hoc committee elected by the faculty should informally inquire, to determine whether in its view formal proceedings to consider his dismissal should be instituted. *If* such proceedings *should be undertaken*, the grounds jointly formulated by the president and the faculty committee . . .

2. Commencement of Formal Proceedings

The formal proceedings . . . a communication to the faculty member by the president . . . a hearing whether he should be removed . . . sufficient time to prepare his defense. The faculty member *should be informed*, in detail or by reference to published regulations, of the procedural rights accorded to him.

3. Suspension of the Faculty Member

Suspension justified only if immediate harm to himself or others is threatened by his continuance.

4. Hearing Committee

The committee of faculty members *should* either be an elected standing committee *not previously concerned* with the case . . .

. . . .

THE STANDARDS FOR NOTICE OF NONREAPPOINTMENT (1964)

. . . .

Because a probationary appointment, . . . carries an expectation of renewal, ...

. . . .

The Standards of Notice

. . . .

P.29 ACADEMIC FREEDOM AND TENURE IN QUEST FOR NATIONAL SECURITY (1956)

. . . .

Relevant General Principles

1. The justification of academic freedom

. . . .

Addendum—AAUP Redbook: Policy Documents and Reports, 1977-Excerpts.

P.31 8. Procedural due process in tenure cases
The principles of procedural due process . . .

. . . .

P.32. 11. Faculty members not on tenure
. . . Dismissal or other adverse action prior to the expiration of a term appointment requires the same procedures as does dismissal of a faculty member with tenure . . .

P.40. American Association of University Professors
American Council on Education
Association of Governing Boards
of Universities and Colleges
Statement on
GOVERNMENT OF COLLEGES AND UNIVERSITIES
(1966)
V. The Academic Institution: The Faculty
The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status. On these matters the power of review or final decision lodged in the governing board or delegated by it to the president should be exercised adversely only in exceptional circumstances, and for reasons communicated to the faculty.

. . . .

Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal. The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy.

. . . .

PLAINTIFF'S MOTION TO RECONSIDER PLAINTIFF'S MOTION TO STAY PROCEEDINGS MANDATED BY PARAGRAPHS 3-11 OF THIS COURT'S ORDER OF 20 JULY 1977 PENDING ADJUDICATION OF ALL CHALLENGES TO THAT ORDER

22. Said Defendants' Counsels acting in concert have
    a) denied they must comply with the PA Sunshine Law and the formal Opinion 46 (1974) of the PA Attorney General, to hold all meetings in public, even after Plaintiff in response to their inquiry, vigorously affirmed he wanted open hearings;
    b) have in concert and by prior secret agreement submitted surreptiously documents to members of said CPA, without making said submissions known to Plaintiff or his Counsel until a member of said CPA accidentally revealed in his question to Plaintiff that he had received such documents
        (i) some time before the 17 November 1977 proceeding from one Defendants' Counsel through another Defendants' Counsel;
        (ii) which document was used as a basis for the presentation made by a third Defendants' Counsel to the CPA at that proceeding.

- all in flagrant disregard of PA's Code of Professional Responsibility . . .

24. That Defendants' Chief Counsel has assigned five (5) Defendants' Counsels as Legal Advisors to each entity forseen in this Court Order; that said Defendants' Counsels or former Counsels
    a) conduct "faculty" elections;
    b) act as spokespersons, corresponding secretaries, and virtually overseers of said entities;
    c) in concert surreptiously provide such entities selected documents upon which others of their legal team will base his arguments before such an entity;
    d) fail to inform Plaintiff and his Counsel of a change of location for hearings;

clearly makes impossible any "fair trial" or "fair tribunal" but only gross conflicts of interest, in a way even more prejudicial than the Third Circuit envisaged in its prscription of *hearings after fact.* (Please see Affidavits #1 and #2 attached hereto).

Excerpt: PLAINTIFF'S REPLY BRIEF RELATING TO ITS MOTION TO ENFORCE JUDGMENT OF JULY 20, 1977

It is apparent from the parties' pleadings and briefs that there are factual differences that must be resolved. In addition, the supporting document for the actions taken by the president of Bloomsburg State College during the course of the hearings was by an affidavit of someone other than the president, making a document which can be classified as hearsay even more remote. It is therefore suggested that a hearing be conducted in order to form a basis for determining both factual and legal issues.

. . . the defendants derived their own procedure, which kept changing, and the final form of which was never made known to the plaintiff. Defendants current counsel was confused as to what took place, and so how could a layman who had great rights at stake be expected to assent to proceedings the nature of and the ramifications of which were not set forth. It is significant to remember in light of *Chung v Park,* 514 FEd. 2d 382 (1975), that the plaintiff could have waived rights to which he was entitled by attending and participating in the hearing; and while rights may be waived, the law certainly does not require that they must be waived. It was with this in mind that the plaintiff refused to walk down the blind alley which the defendants contend was due process. Due process is not to be viewed from hindsight, but what the individual was facing at the relevant time in question.

Docket - 17a, Page 29. Order No. 2. The stipulation filed August 1, 1980, be and the same time is hereby disapproved to the extent that it provides that "issues 2 and 3 listed in the plaintiff's statement of issues shall be continued until the determination of the above-referred to Commonwealth

Court cases and the grievance procedure. (M) 8-5-80. - Stipulation of Counsel - that issues two and three listed in the plaintiff's Statement of Issues shall be continued until the determination of the above referred to Commonwealth Court cases and the grievance procedure." (M) 8-5.-80.

Academic Freedom and Responsibility

As a citizen and a member of the teaching profession, the faculty member is entitled to speak and act with freedom from institutional censorship or discipline. He is also entitled to full freedom in research and in the publication of the results of research; but any obligation contracted for pecuniary return which interferes with the discharge of his regularly assigned duties should have the prior approval of the appropriate Department Chairman, Dean, and of the President of the College.

e. If a faculty member's service to the College is to . . . See full text of § 5e in Appendix, p. 152.

PLAINTIFF'S BRIEF IN SUPPORT OF ITS MOTION TO ALTER OR AMEND

It is submitted that there are factual differences that must be resolved and evidence which must be considered before a proper decision could be reached on plaintiff's motion to enforce. The disarray which resulted from the defendants' preparations for the dismissal hearing is exemplified by the fact that not only was defendants' current counsel of the misunderstanding that the pretermination hearing body was composed of four members of the CPA and an executive assistant to the president (page 6 of defendants' brief), but this court held the same misconception (page 3 of opinion dated December 5, 1980). The members of the CPA were the body which eventually heard the dismissal, but the plaintiff did not receive prior notice of that fact. If the court and defendants' own counsel were confused, where would that have left the plaintiff at the time all this was happening.

Addendum—Docket, U.S. District Court, Middle District of Pennsylvania, Excerpts.

There is factual dispute as to whether or not the procedures which plaintiff was advised would govern were in fact implemented. How can it be determined if the due process standards were met when it is unresolved as to what procedures were in fact utilized. There also has been no evidence or documentation to indicate under what authority the hearing body which met on January 14, 1978 was convened, and this would also appear to be an essential element.

While the Opinion may be correct in stating that it is not for the court to determine whether or not the hearing complied with various state laws, fundamental fairness should require that a body provide those procedures which they have stated they would provide. Therefore, the question before this court is not whether or not the Sunshine Law and Administrative Agency Law are required under state law, but whether or not they are required by due process once the defendants have stated that they would be complied with. If the integrity of government is to be maintained, its officials should not be permitted to say one thing and then do another.

Turning to the contractual procedures to which the plaintiff claims he was entitled, this court has rendered its opinion without considering the Bloomsburg State College Faculty Handbook, 1970-71; the 1940 AAUP Statement of Principles and the 1958 Statement explaining it. These documents are the foundation upon which the plaintiff bases his right to the Article IX procedures contained in the Bloomsburg State College 1968 Statement of Policy. It is the faculty handbook which adopts the 1940 statement, which in turn requires that a non-tenured faculty member receive the same procedures for a *mid-term dismissal* as those received by a tenured faculty member for any termination.